

IN THE SUPREME COURT OF OHIO

ORIGINAL

13-1402

STATE OF OHIO, : Case No. \_\_\_\_\_  
Plaintiff-Appellee, : On Appeal from the Clark  
County Court of Appeals, Second  
v. : Appellate District  
ADAM EGGERS, : C.A. Case No. 2011-CA-48  
Defendant-Appellant. :

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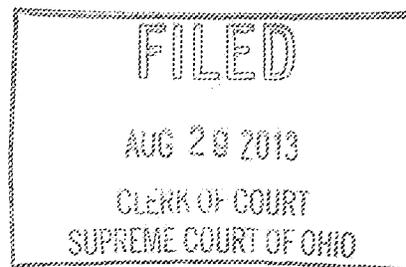
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ADAM EGGERS

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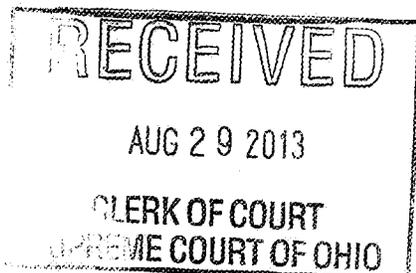
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**EXPLANATION OF WHY THIS CASE RAISES  
SUBSTANTIAL CONSTITUTIONAL QUESTIONS**

This case raises substantial constitutional questions that must be resolved by this Court. The court of appeals decision, from which this appeal is brought, represents a significant deviation from the established precedent of this Court. The court of appeals decision applies a “substantial compliance” standard to a violation of Criminal Rule 11 (C)(2)(c). This Court has previously insisted on “strict compliance” with Crim. R. 11 (C)(2)(c) in *State v. Ballard* (1981), 66 Ohio St.3d 473. This standard was affirmed in *State v. Veney* (2008), 120 Ohio St.3d 176.

In this case, the trial court failed to receive an affirmation from the Defendant that he understood that he was waiving the constitutional rights enumerated in Criminal Rule 11 (C)(2)(c). When the court asked if he understood that he was waiving these rights, he asked the court to repeat itself. The court repeated the information and then asked for his plea. Without ever stating that he understood that a guilty plea meant that he was waiving his constitutional rights, the Defendant pled guilty.

In reviewing this error, the court of appeals ruled that because the Defendant pled guilty when asked for his plea, that it could presume that he understood that he was waiving the constitutional rights in Crim. R. 11 (C)(2)(c). However, such a presumption is in direct conflict with this Court’s mandate that trial courts strictly comply with Crim. R. 11 (C)(2)(c). A court cannot merely *presume* that a defendant is waiving his constitutional rights and still ensure that he has made the intentional relinquishment of the constitutional rights required by due process. *McCarthy v. United States*, 394 U.S. 450 (1969).

The trial court also completely omitted the requirement of Criminal Rule 11 (C)(2)(b) by failing to advise the Defendant of the effect of the plea or that by accepting the plea, that the court could proceed directly to judgment and sentence. Because the trial court failed to even

partially comply with the rule, the Appellant is not required to show prejudice. *State v. Griggs* (2009), 103 Ohio St.3d 85.

However, prejudice was nonetheless present as represented by the protestations of innocence that accompanied the Defendant's plea. Because the Defendant protested his innocence at the plea hearing, the trial court was required to make necessary inquiries to determine that the Defendant was making a rational decision to plead guilty despite the protestations of innocence. By failing to do so, the trial court ignored the constitutional standards set forth in *North Carolina v. Alford*, 400 U.S. 160 (1970).

The court of appeals decision raises a number of substantial constitutional questions, not the least of which is whether the court was required to treat the Defendant's plea as an *Alford* plea when the protestation of innocence came just seconds after the plea. This court should also decide whether the court of appeals error in failing to comply with Criminal Rule 11 (C)(2)(b) should be taken into consideration when evaluating the timing of the protestations of innocence. There is a substantial likelihood that if the trial court had bothered to inform the Defendant that his plea was a complete admission of guilt, that he would have made his protestations of innocence sooner rather than later. Furthermore, if the trial court had informed the Defendant that upon acceptance of the plea it might proceed directly to judgment and sentence, then the protestation of innocence could have come sooner. It is through no fault of the Defendant's that the trial court failed to do any of these things. At the first opportunity that the Defendant is given to address the court, other than to answer a direct question, he protests his innocence. As such, the trial court was required to treat the plea as an *Alford* plea and to inquire as to whether he was making a rational decision to waive his constitutional rights. The court's failure to do so renders the conviction void.

A further substantial constitutional question arises because the trial court misrepresented to the Defendant that he would be on Post Release Control (hereafter, "PRC") after his release instead of on parole. The trial court explained to the Defendant that the maximum penalties he would face for a violation of PRC was eight years in prison. In fact, PRC was inapplicable to the Defendant's plea and he actually faces life imprisonment for any violation upon release. Unlike the defendant in *State v. Clark*, (2008) 119 Ohio St.3d 239, here the Defendant never received the correct information along with the incorrect information. This error, along with the protestation of innocence, and the other errors of the trial court resulted in a plea that was not made knowingly, voluntarily, and intelligently and it is therefore void.

This court should accept jurisdiction over this case in order to ensure that lower courts properly apply this Court's previous holdings on strict and substantial compliance with Crim. R. 11 and to ensure that pleas are entered knowingly, voluntarily, and intelligently as the Constitution of the United States demands.

### **STATEMENT OF THE CASE AND FACTS**

This case arose from a homicide in Clark County, Ohio. On May 16, 2010, someone fired a number of gunshots near a home on Southfield Avenue in the City of Springfield. One of those shots entered a residence at 926 Southfield Avenue and struck and killed Julie Snyder. In January 2011, Appellant Adam Eggers was indicted on two counts of Aggravated Murder, one count of Murder, and one count of Felonious Assault, each with a firearm specification. Mr. Eggers was also charged with one count of Discharging a Firearm into a Habitation and one count of Mishandling a Firearm in a Motor Vehicle. He pled not guilty to all counts.

A trial was originally scheduled for March 31, 2011 and was rescheduled to June 13, 2011. On June 6, 2011 defense counsel filed a Motion to Suppress Statements. At the hearing on that motion on June 9, 2011, Appellant entered a change of plea. Specifically, Appellant pled guilty to one charge of murder and the remaining counts were dismissed. Appellant was sentenced to 15 years to Life imprisonment at the same hearing, immediately following the acceptance of the plea.

Appellant filed a timely notice of appeal where he argued that his plea and his waiver of rights were not knowingly, intelligently, and voluntarily made. Appellant, on June 20, 2011, filed a motion to withdraw his guilty plea; however, the trial court's subsequent denial of that motion is not a part of the present appeal. In the direct appeal, Appellant further argued that the trial court's erroneous statements regarding the applicability of Post Release Control also made the plea not knowingly, intelligently, and voluntarily made. The Second District Court of Appeals denied the appeal in a decision dated July 23, 2013. The lower court erred when it failed to require strict compliance with the waiver of rights in Crim. R. 11 (C)(2)(c). The lower court also erred when it failed to require the trial court to make the necessary inquiries when there is a protestation of innocence during the plea proceedings as required by *North Carolina v. Alford*, 400 U.S. 25 (1970). The appellate court additionally erred when it found that the trial court's erroneous instructions on penalties for post release control did not influence the Appellant's decision to enter the plea. In support of these contentions, the Appellant offers the following argument.

## ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

**Proposition of Law No. 1:** The trial court failed to strictly comply with Crim. R. 11 (C)(2)(c) when it failed to ascertain that the Defendant understood that he was waiving the constitutional rights enumerated therein, making the plea less than knowing, intelligent, and voluntary.

The trial court violated the Defendant's constitutional rights when it failed to inquire as to whether the Defendant understood that he was waiving the constitutional rights enumerated in Crim. R. 11. In reviewing the error on appeal, the court of appeals failed to follow the strict compliance standard required by this Court in *State v. Ballard* (1981), 66 Ohio St.3d 473, ¶ 2 syllabus.

The United States Supreme Court has ruled that "prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self incrimination, his right to a jury trial, his right to confront his accusers, and his right of compulsory process of witnesses. *Boykin v. Alabama*, 395 U.S. 238 (1969). The Supreme Court has further insisted that in order for a waiver of constitutional rights to be valid under the Due Process Clause of the United States Constitution it must be shown to have been an "intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *McCarthy v. United States*, 394 U.S. 450 (1969). However, if a guilty plea is not knowingly, voluntarily, and intelligently made, "it has been obtained in violation of due process and it is therefore void." *McCarthy*, 394 U.S. at 466.

In Ohio, the process for ensuring that a plea is knowingly, voluntarily, and intelligently made is set forth in Criminal Rule 11 (C). This Court has made it clear that trial courts must

substantially comply with Crim.R.11 (C)(2)(a) and (b) and they must strictly comply with Crim.R. 11 (C)(2)(c). *State v. Veney* (2008), 120 Ohio St.3d 176, 897 N.E.2d 621.

In the court of appeals, the Appellant raised a violation of Criminal Rule 11 (C)(2)(c) which requires strict compliance. *Id.* However, the court of appeals failed to apply the strict compliance standard mandated by *Veney*. Instead, the court of appeals failed to identify what standard was utilized, but it appears to have applied a substantial compliance standard to a violation of Crim.R. 11 (C)(2)(c) in repudiation of this Court's ruling in *Veney*.

Crim.R. 11 (C)(2)(c) states in relevant part:

In felony cases the court may refuse to accept a plea of guilty or a plea of no contest without first addressing the defendant personally and doing all of the following:

- (c) Informing the defendant *and determining that the defendant understands* that by the plea the defendant is waiving the rights to a jury trial, to confront the witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

Crim. R. 11 (C)(2)(c)(emphasis added).

In this case, the trial court failed to make a determination that the defendant understood the waiver of his constitutional rights by waiving his plea. During the plea colloquy, the judge asked the defendant if he understood that he was giving up or waiving all of his constitutional rights that the court had gone over. The Defendant responded by asking, "I'm sorry, can you say that again?" (Trial Tr. 9). The court repeated the recitation of rights and then stated, "Understanding that, how do you wish to plead to the offense of felony murder in count three of the indictment?" The Defendant then pled guilty. (Trial Tr. pp. 9-10).

Noticeably absent from the plea colloquy is any affirmation from the Defendant that he understood that he was waiving his rights. Instead, the trial court, as well as the appellate court, simply presumed that the Defendant understood that he was waiving his constitutional rights because he eventually pled guilty. However, presumption has no place in the waiver of important constitutional rights. As this Court has stated, “we cannot presume a waiver of these important federal rights from a silent record.” *State v. Veney*, 120 Ohio St.3d at 182, *citing*, *Boykin v. Alabama*, 395 U.S. at 243.

Criminal Rule 11(C)(2)(c) requires not just that the defendant’s constitutional rights be listed by rote, but it explicitly insists that the court inform the defendant of his rights *and* determine that the defendant understands that by the plea the defendant is waiving his federal constitutional rights. Here, the trial court failed to make any effort to determine that the defendant understood the waiver of rights and the courts failure to strictly comply with Crim.R. 11(C)(2)(c) warrants reversal.

Additionally, when listing the rights to be waived, the trial court failed to strictly comply with Crim. R. 11(C)(2)(c). The trial court stated to the Defendant that he had, “the right to use the court’s subpoena power to compel the attendance of witnesses who would testify against you and also the right to testify if you choose to do so but you could not be forced to do so.” (Trial Tr. 9-10). In this statement, the trial court unnecessarily mixes together distinctly different constitutional rights and ends up with a highly inaccurate statement of law that is not at all reflective of the federal constitutional rights the Defendant is supposed to knowingly, voluntarily and intelligently waive.

The right to testify is found in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The right against self incrimination is distinctly different right grounded in

the Fifth Amendment. The court's effort to combine these rights together creates a confusing and unclear statement of the rights being waived.

Criminal Rule 11(C)(2)(c) requires the court to inform the defendant that he is waiving the right to "require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." This is a clear, concise, and accurate explanation of the rights under the Fifth Amendment which it addresses. However, the trial court's ineloquent blending of the right against self incrimination with the right to testify creates an unnecessary confusion of the nature of the rights being waived.

Likewise, the trial court also blends the right to confrontation and the right to compulsory process to create "the right to use the court's subpoena power to compel the attendance of witnesses who would testify against you." This too is a highly inaccurate statement of the law and a confusing recitation of the legal rights to be waived. The Defendant, of course, has the right to confront the witnesses who would testify against him and he also has the right to compel the attendance of witnesses to testify on his behalf; however, this is not at all clear from the statement of the trial court.

The court of appeals attempts to justify the trial court's confusing language by noting that this Court has condoned the use of common everyday words to assist the defendant in understanding the rights forfeited by the plea. *State v. Barker*, (2011) 129 Ohio St.3d 472. But it is difficult to see how the trial court's language was in any way less confusing than the language in Criminal Rule 11. Especially here where the Defendant has to ask the court to repeat itself and never indicates that he did indeed understand that he was waiving the rights the court recited. Standing alone, the court's confusing language is enough to find that the trial court did not strictly comply with Crim.R. 11(C)(2)(c). This alone requires reversal. However, when

coupled with the Defendant's apparent confusion and the court's failure to ascertain that the Defendant understood that he was waiving these rights, the overall picture is one of plea that was clearly not made knowingly, voluntarily, or intelligently.

**Proposition of Law No. 2:** The trial court failed to substantially comply with Criminal Rule 11(C)(2)(b) when it failed to advise the Defendant that a guilty plea is a complete admission of the offense; this omission coupled with the Defendant's protestations of innocence made the plea not knowingly, voluntarily, or intelligently made.

The trial court, during the plea proceeding, never advised the Defendant that a guilty plea was a complete admission of the offense. Further, the Defendant protested his innocence during the plea hearing, but the trial court never engaged the Defendant in any colloquy designed to determine that he was making a rational calculation to waive his rights to a trial as required by *North Carolina v. Alford*, 400 U.S. 160 (1970). For these reasons, the trial court failed to substantially comply with Crim. R. 11 (C) and it also violated the Defendant's rights to Due Process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

In addition to the strict compliance required for Criminal Rule 11(C)(2)(c), this Court has also insisted upon substantial compliance with Crim. R. 11(C)(2)(a) and (b). *State v. Veney* (2008), 120 Ohio St.3d 176. Criminal Rule 11(C)(2)(b) requires a trial court to determine that the defendant "understands the effect of the guilty plea . . . and that the court, upon acceptance of the plea, may proceed to judgment and sentence." In interpreting this rule, this Court has stated, "a defendant who has entered a guilty plea *without asserting actual innocence* is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim R. 11 is presumed not to be prejudicial." *State v. Griggs* (2009), 103 Ohio St.3d 85, syllabus (emphasis added). Thus, in order for a court to ignore the mandates of Crim. R. 11(C)(2)(b), the hearing must be free of any

protestation of innocence. However, in the present matter, there was a protestation of innocence in the plea hearing which the trial court simply ignored. As such, the presumption of non-prejudice permitted by *Griggs* does not apply.

The required demonstration of prejudice is also cast into doubt by this Court's ruling in *State v. Clark* (2008), 119 Ohio St.3d 239; 893 N.E.2d 462. In *Clark*, this court found that the defendant was required to demonstrate prejudice for a violation of Crim. R. 11 (C)(2)(b) because the trial court had partially complied with the rule. *State v. Clark* (2008), 119 Ohio St.3d 239; 893 N.E.2d 462, *citing*, *State v. Nero* (1990), 56 Ohio St.3d 106, 108. In contrast, the trial court in the present case simply ignored Crim. R. 11 (C)(2)(b) in its entirety and it did not partially comply with the rule. Accordingly, the Appellant is not required to demonstrate prejudice. Nonetheless, Appellant's protestations of innocence would suffice to demonstrate prejudice if such a standard were applicable.

The United States Supreme Court has made it clear that a trial court may accept a defendant's plea of guilty pursuant to a negotiated plea bargain despite protestations of innocence when the record contains factual circumstances of the crime and indicates the defendant made a rational calculation to waive his right to trial. *North Carolina v. Alford*, 400 U.S. 160 (1970). In the present matter, the protestation of innocence was not accompanied by any type of inquiry designed to ensure that there was a rational calculation to waive the right to trial.

The plea proceeding overall lacked any type of meaningful dialogue between the defendant and the court. *Garfield Heights v. Brewer* (1980), 17 Ohio App.3d 216, 218. The trial court failed to give the defendant any opportunity to make any statement prior to stating his plea. Once he pled guilty, the trial court then asked the Defendant, for the first and only time, if he had

anything to say. At that point he replied, “There is, but I don’t know if I can speak.” (Tr. 10). This is followed by a discussion between the Defendant and his attorney, after which the Defendant states, “You know I didn’t do this. I didn’t do this.” (Tr. 11).

These statements by the Defendant can be construed as nothing other than a protestation of innocence. At this point the trial court was required to engage in an inquiry to determine if there was a rational calculation to waive the right to trial. The trial court’s failure to make this determination violates the Due Process rights of the Defendant.

The court of appeals in reviewing this error focused solely on the timing of the protestation of innocence and found that because it came immediately after the Defendant announced his plea and was not concurrent with the plea, the trial court was free to ignore the protestation of innocence. However, this rationale lacks support. While it is true that some courts have found *Alford* inapplicable when the protestation comes at sentencing, they do so under the theory that, “a defendant should not be able to plead guilty and test the waters as to what the sentence would be and then bring that plea into doubt if the defendant is unhappy with the sentence.” *State v. Cutlip*, 1998 Ohio App. LEXIS 2899 (8th Dist. 1998). This rationale makes sense, but those circumstances are not present here.

In this case, the protestation of innocence came within seconds of the plea. Sentencing had not yet been discussed nor was there adequate time for the protestations of innocence to be the product of a change of heart. Any effort to create a demarcation between the plea hearing and the sentencing hearing is, at best, artificial. Furthermore, the Defendant had not been given a prior opportunity to address the court, the court never informed the Defendant of the effect of the plea, and the court never informed the defendant that it may proceed with judgment and sentence upon acceptance of the plea as required by Crim. R. 11 (C)(2)(b).

Therefore, the trial court failed to even partially comply with Crim. R. 11 (C)(2)(b). The protestation of innocence, which immediately followed the plea, demonstrates both prejudice for the Crim. R. 11 violation and it also demonstrates a violation of the due process guarantees defined in *North Carolina v. Alford*. The record clearly demonstrates that at the first opportunity the Defendant is given to address the court, he protests his innocence. As such, the court was required to inquire as to the rational calculation behind the waiver of his constitutional right to a jury trial. The failure to do so renders the plea void.

**Proposition of Law No. 3:** The trial court's misrepresentation of the applicability of Post Release Control rendered the plea not knowingly, intelligently, and voluntarily made.

The trial court, prior to taking the Defendant's plea, informed the Defendant that he was subject to Post Release Control and could be subject to sanctions for violating its terms up to a maximum of eight years. This information was incorrect. The Defendant was about to enter a plea to an unclassified felony and the sanction he could receive for a violation is life imprisonment, not the eight years that was represented to him by the trial court.

This Court recently addressed this issue in *State v. Clark*, (2008) 119 Ohio St.3d 239. This Court ruled in *Clark* that such misrepresentations by the trial court were a failure to substantially comply with Crim. R. 11 (C)(2)(a), but so long as the judge partially complied with the rule, then the defendant must show prejudice. *Clark*, 199 Ohio St.3d at 247.

In the instant matter, the Appellant is able to demonstrate prejudice. The Defendant was charged with aggravated murder and pled guilty to a lower charge of murder, in exchange for the dismissal of the aggravated murder and other related charges. The bargain in this negotiated plea is the earlier release date and the post-release conditions, including the penalties for possible

sanctions. The post release control is part of the incentive offered as inducement for taking the plea. The court informed the Defendant that the maximum penalty he can receive for violations of PRC is eight years. In contrast to the defendant in Clark, the court never told this Appellant that the penalty for a parole violation could be life imprisonment. As such, the Defendant entered his plea under the mistaken belief that the maximum penalty he can receive for violations of PRC is eight years. This is not a minor transgression, but a serious misrepresentation of the law concerning the consequences of the plea.

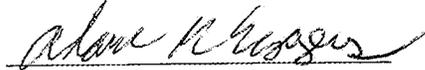
The trial court made this error prior to the entering of the plea and also incorporated the misinformation into the written plea agreement. This distinguishes it from cases where the error is limited to the sentencing hearing. Additionally, the court of appeals agreed that PRC was improperly imposed; however, its remedy of vacating the portion of the sentence dealing with PRC does not adequately address the misrepresentations of law that were made to the Defendant prior to the acceptance of the plea.

If this had been the only misrepresentation made by the court, perhaps prejudice would not be apparent. But here, this misrepresentation of the applicable law was combined with the numerous other errors as explained above. All of these errors together render the plea not knowingly, voluntarily, and intelligently made. As such, the Appellant's Due Process rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments were violated and the plea is void.

### **CONCLUSION**

For the reasons discussed above, this case involves a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented above will be reviewed on their merits.

Respectfully submitted,

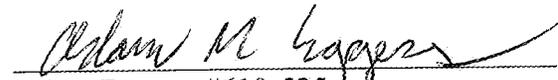


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APPELLANT APPEARS PRO SE

**Certificate of Service**

The undersigned hereby certifies that a copy of the foregoing notice of appeal was mailed by regular U.S. Mail, postage pre-paid, to counsel for the State of Ohio Lisa M. Fannin, Clark County Prosecutor's Office, 50 E. Columbia St., 4<sup>th</sup> Floor, P.O. Box 1608 Springfield, OH, 45501 on this the 26<sup>th</sup> day of August, 2013.

  
Adam Eggers, #610-525

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. \_\_\_\_\_  
Plaintiff-Appellee, : On Appeal from the Clark  
v. : County Court of Appeals, Second  
ADAM EGGERS, : Appellate District  
Defendant-Appellant. : C.A. Case No. 2011-CA-48

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APPENDIX TO  
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ADAM EGGERS

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waiver of rights were not knowingly, intelligently, and voluntarily made, due to the trial court's failure to comply with Crim.R. 11 during the plea colloquy and the trial court's mistake in sentencing Eggers to a term of postrelease control. We conclude that the trial court complied with Crim.R. 11 by informing Eggers of his rights and determining that Eggers understood that a guilty plea waived those rights. We further conclude that the trial court erred in sentencing Eggers to postrelease control, but that Eggers has failed to demonstrate that he was prejudiced by the trial court's error. Accordingly, the portion of the trial court's judgment imposing a five-year term of postrelease control is Vacated, and the judgment is Affirmed in all other respects.

### **I. Course of the Proceedings**

{¶ 2} In May 2010, Adam Eggers fired four shots into a residence located at 926 Southfield Avenue in Springfield, Ohio, with the intention of killing Dustin Bryant. One of the shots went through a wall and struck Julie Snyder, killing her instantly. Eggers was indicted on one count of Aggravated Murder, R.C. 2903.01(A), with a firearm specification, two counts of Felony Murder, R.C. 2903.02(B), each with a firearm specification, one count of Felonious Assault, R.C. 2903.11(A)(2), with a firearm specification, one count of Improperly Discharging a Firearm at or into a Habitation, R.C. 2923.161(A)(1), and one count of Improper Handling of Firearms in a Motor Vehicle, R.C. 2923.16(B). Dkt. 1.

{¶ 3} Pursuant to a plea agreement, Eggers pled guilty to Felony Murder, as charged in count three of the indictment, causing the death of another as a proximate result of improperly discharging a firearm at or into a habitation, in violation of R.C. 2903.02(B) and 2923.161(A)(1). In exchange for Eggers's guilty plea, the State dismissed the firearm

specification attached to count three and the remaining charges and specifications. The parties agreed that Eggers's sentence would be fifteen years to life.

{¶ 4} Immediately after accepting his guilty plea, the trial court sentenced Eggers to life imprisonment with parole eligibility after fifteen years. The trial court also sentenced Eggers to a mandatory five-year term of post-release control. Dkt. 23.

{¶ 5} Eggers appeals from his conviction and sentence.<sup>1</sup> Eggers's appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 19 L.Ed.2d 493 (1967), stating that he could find no meritorious issues for appellate review, but suggesting two potential issues for review. We notified Eggers of his appellate counsel's representations and afforded him time to file a pro se brief. Eggers filed a pro se brief raising three issues for review, which involved the same matters his appellate counsel had assigned as potential error. Based on our review of the issues raised by appellate counsel and Eggers, we determined that there was a non-frivolous issue with respect to whether Eggers's plea was knowingly, voluntarily, and intelligently made. Therefore, we appointed new appellate counsel to argue the error assigned, as well as any other error counsel should deem meritorious. *State v. Eggers*, 2d Dist. Clark No. 11CA48, 2012-Ohio-2967. Eggers's new appellate counsel subsequently filed a brief raising two assignments of error, which we address herein.

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<sup>1</sup> Eggers moved under Crim.R. 32.1 to withdraw his guilty plea, claiming that he was coerced into pleading guilty by his counsel and that he was innocent of the charge of Murder. Dkt. 26. The trial court overruled his motion without a hearing. Eggers subsequently filed a petition for post-conviction relief, which the trial court also overruled without a hearing. Neither of these decisions is within the scope of this appeal.

**II. The Trial Court Adequately Explained Eggers's Rights and Determined that Eggers's Plea Was Knowing, Intelligent, and Voluntary**

{¶ 6} Eggers's First Assignment of Error states:

APPELLANT'S GUILTY PLEA AND WAIVER OF RIGHTS WERE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE.

{¶ 7} At the plea hearing, counsel for the State explained the terms of the plea agreement. Tr. 3. The State then placed the pertinent facts on the record relating to the night that Julie Snyder was killed. *Id.* at 4-5. Eggers acknowledged that he understood the terms of the plea agreement, and said that he was not under the influence of drugs, alcohol, or medication. Eggers informed the trial court that he had signed the plea agreement after reviewing it with his attorney, and that he understood the agreement. Eggers stated that no one had threatened him to convince him to plead, and that he was pleading guilty voluntarily. The court then explained to Eggers the punishment for the offense of Felony Murder, and that Eggers was subject to a mandatory five years of post-release control. *Id.* at 5-8.

{¶ 8} The trial court then engaged in the following colloquy with Eggers:

THE COURT: And do you understand that you do have the right to a trial in this case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: At that trial you would have the right to require the State to prove beyond a reasonable doubt each and every element of the offense to which you are pleading guilty, and you could only be convicted upon the unanimous verdict of a jury. You would have the right to confront witnesses

who would testify against you, and your attorney could cross-examine those witnesses. You would have the right to use the Court's subpoena power to compel the attendance of witnesses on your behalf, and you would also have the right to testify, but you could not be forced to do so. *Do you understand all of these rights?*

THE DEFENDANT: *Yes, Your Honor.*

THE COURT: *By pleading guilty you would be giving up or waiving all of these rights that we have gone over. Understanding that at this time how did you wish to plead to the offense of murder in Count Three of the indictment?*

THE DEFENDANT: *I'm sorry. Can you say that again?*

THE COURT: *Sure. I just want to make sure that you do understand that upon entering a guilty plea in this case you would be waiving or giving up all of those rights that we have gone over, the trial rights that you would have. The right to a trial, the right to the State proving their case beyond a reasonable doubt, the right whereby you could only be convicted upon the unanimous verdict of a jury, the right to confront witnesses who would testify against you, the right to have your attorney cross-examine those witnesses, the right to use the Court's subpoena power to compel the attendance of witnesses who would testify against you and also the right to testify if you choose to do so but you could not be forced to do so. By pleading guilty you would be giving up or waiving those rights. Understanding that, how did you wish to plead to the offense of felony murder in Count Three of the*

*indictment?*

THE DEFENDANT: *Guilty, Your Honor.*

THE COURT: The Court finds that the defendant has knowingly, voluntarily, and intelligently waived his rights and entered a plea of guilty to that offense, and based upon that plea I find him guilty of that offense. *Id.* at 8-10 (Emphasis added.)

{¶ 9} Eggers contends that the trial court's explanation of his rights, and the fact that by pleading guilty he would waive these rights, was confusing, thereby rendering his guilty plea less than knowing, voluntary, and intelligent. According to Eggers, the trial court erred when it explained all of the rights at once, rather than one at a time, and when it failed to ask Eggers if he understood that a guilty plea would waive his rights. Based on our review of the particular facts of this case, we do not agree.

{¶ 10} Crim.R. 11(C)(2)(c) provides that the court may not accept a plea of guilty or no contest:

without first addressing the defendant personally and . . . [i]nforming the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 11} A guilty plea is constitutionally infirm when the defendant is not informed in a reasonable manner that his plea waives those rights. *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E. 2d 115 (1981).

{¶ 12} In *Ballard*, the Ohio Supreme Court described how a trial court must explain a defendant's rights under Crim. R. 11, stating, at paragraphs one and two of the syllabus:

1. Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses. (*Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, followed.)

2. Failure to use the exact language contained in Crim.R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner reasonably intelligible to that defendant. (*State v. Caudill*, 48 Ohio St.2d 342, 358 N.E.2d 601, modified.)

{¶ 13} In *State v. Thomas*, 116 Ohio App.3d 530, 534, 688 N.E.2d 602 (2d Dist.1996), we expounded on the Supreme Court's statement regarding Crim. R. 11 and the exchange that the trial court is required to have with a defendant prior to accepting his guilty plea:

The purpose of the procedure required by [Crim.] R. 11(C) is to ensure that the defendant subjectively understands each of the rights concerned and that he waives it by his plea of guilty or no contest. That proposition must be demonstrated by the record. The preferred method is to use the language contained in the rule, stopping after each right and asking whether the defendant understands that right and knows that his plea waives it. *Id.*

When that is not done, the record must, in some other way, affirmatively demonstrate the propositions made necessary by the rule.

{¶ 14} In short, "a trial court can still convey the requisite information on constitutional rights to the defendant even when the court does not provide a word-for-word recitation of the criminal rule, so long as the trial court actually explains the rights to the defendant." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 27.

{¶ 15} The trial court explained each of Eggers's rights to him. After doing so, Eggers stated that he understood these rights. Tr. 8-9. The trial court then explained that by pleading guilty, Eggers would be waiving those rights, once again stating each of Eggers's rights. The court then stated, "By pleading guilty you would be giving up or waiving all of these rights that we have gone over. Understanding that at this time how did you wish to plead to the offense of murder in Count Three of the indictment?" Eggers then stated "I'm sorry. Can you say that again?" The trial court then once again explained all of Eggers's rights and that a guilty plea would mean that Eggers is waiving all of these rights. The court concluded by once again asking, "Understanding that, how did you wish to plead to the offense of felony murder in Count Three of the indictment?" This time, Eggers responded that he was pleading guilty.

{¶ 16} Eggers contends that the trial court erred by failing to ask Eggers if he understood that a guilty plea would waive his rights. The trial court did ask this question, albeit in an imperfect way. The trial court asked, "Understanding that, how did you wish to plead to the offense of felony murder in Count Three of the indictment?" This question essentially asked, "Assuming you understand that a guilty plea waives these rights, how do you wish to plead?" By answering "guilty," Eggers implied that he understood that a

guilty plea would waive his rights and that he was pleading guilty. While we agree that the better practice would have been to stop after the explanation of each right and ask whether Eggers understood the right and that a guilty plea waived the right, we conclude the trial court's three explanations of Eggers's rights, Eggers's confirmation that he understood the rights, and the trial court's two explanations to Eggers that a guilty plea would waive the rights, were sufficient to establish that Eggers's guilty plea was knowing, intelligent, and voluntary. Eggers also stated that he understood what was contained on the written plea form that he signed voluntarily. His rights and the consequences of a guilty plea were explained on this form. Based upon the entire plea colloquy, we conclude that the trial court could reasonably determine, as required by Crim.R. 11(C)(2)(c), that Eggers understood both his rights and the consequences of his guilty plea.

{¶ 17} Eggers also contends that the trial court failed to comply with Crim.R. 11 when the court addressed the fact that Eggers "cannot be compelled to testify against himself or herself." Crim.R. 11(C)(2)(c). The trial court did not use the language of Crim.R. 11(C), instead stating, "You would have the right to use the Court's subpoena power to compel the attendance of witnesses on your behalf, and you would also have the right to testify, but you could not be forced to do so." Tr. 8-9. The Supreme Court has expressed a preference that the trial court use the language employed in Crim.R. 11 when explaining a defendant's rights to him during a plea colloquy. But the Supreme Court has also made it clear that the failure to employ the language in Crim.R. 11 is not fatal to a guilty plea. Indeed, the Supreme Court has noted that "[t]he use of common, everyday words, \* \* \* instead of a rote recitation of legal terminology, can assist the defendant in understanding the rights forfeited by entry of a plea." *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-

4130, 953 N.E.2d 826, ¶ 20.

{¶ 18} The trial court explained Eggers's right to not be compelled to testify against himself in common, everyday words. Based on our review of the particular facts before us, we conclude that the trial court did not err in doing so.

{¶ 19} Eggers finally argues that the trial court erred by not inquiring whether Eggers's plea of guilty was one that should have been done pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Brief, p. 9-10. Eggers's reliance on *Alford* is misplaced.

{¶ 20} In *Alford*, the United States Supreme Court found that a guilty plea coupled with a claim of innocence should not be accepted unless there is a factual basis for the plea and the trial court inquires into and resolves the apparent conflict between the waiver of trial and claim of innocence. *Id.* at 37. However, "[i]mplicit in any *Alford* plea is the requirement [that] a defendant actually state his innocence on the record when entering a guilty plea." *State v. Knowles*, 8th Dist. Cuyahoga No. 95239, 2011-Ohio-1685, ¶ 20 (Citations omitted.) The record before us discloses no protestations of innocence when the trial court accepted Eggers's guilty plea.

{¶ 21} The only statements in the record that could be construed as a protestation of innocence occurred after the guilty plea had been accepted. The trial court then proceeded to sentencing and asked Eggers if he had anything else to say, thus giving Eggers the chance to exercise his right to allocution. Tr. 10-11. At that time, Eggers stated, for the first time, "I'd like to apologize to the family. You know I loved her. You know I didn't do this. I didn't do this. I love you, mom. I don't know. That's it. I don't know what else to say." *Id.* at 11.

{¶ 22} Eggers waited until sentencing to make any statement regarding innocence. Therefore, *Alford* does not apply, and the trial court had no duty during the plea hearing to inquire whether Eggers's plea of guilty was one that should have been done pursuant to *Alford*.

{¶ 23} Eggers's First Assignment of Error is overruled.

**III. Eggers Has Failed to Demonstrate that He Was Prejudiced  
by the Trial Court's Incorrect Inclusion of Postrelease Control**

{¶ 24} Eggers's Second Assignment of Error states:

THE TRIAL COURT ERRED, AS A RESULT OF A MUTUAL MISTAKE OF THE PARTIES AND THE COURT, BY INFORMING APPELLANT OF AND SENTENCING APPELLANT TO A TERM OF POST RELEASE CONTROL AS PART OF HIS NEGOTIATED PLEA TO THE CHARGE OF MURDER AND THEREFORE WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE.

{¶ 25} When a trial court imposes sentence for any of the classified felonies set forth at R.C. 2967.28(B), it must appropriately advise the defendant of mandatory postrelease control, or the sentence is void ab initio. *State v. Porterfield*, 11th Dist. Trumbull No. 2010-T-0005, 2010-Ohio-4287, ¶ 7. In this case, Eggers pled guilty to, and was sentenced for, one count of Felony Murder, in violation of R.C. 2903.02(B), an unclassified felony, not subject to the dictates of R.C. 2967.28.

{¶ 26} In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E. 2d 462, ¶ 36-37, the Supreme Court addressed parole and postrelease control in the context of a

conviction for an unclassified felony:

However, an individual sentenced for aggravated murder such as Clark is not subject to postrelease control because that crime is an unclassified felony to which the postrelease-control statute does not apply. R.C. 2967.28. Instead, such a person is either ineligible for parole or becomes eligible for parole after serving a period of 20, 25, or 30 years in prison. See R.C. 2929.03(A)(1); 2967.13(A). Parole is also a form of supervised release, but it is not merely an addition to an individual's sentence. When a person is paroled, he or she is released from confinement before the end of his or her sentence and remains in the custody of the state until the sentence expires or the Adult Parole Authority grants final release. R.C. 2967.02(C); 2967.13(E); 2967.15(A); 2967.16(C)(1). If a paroled person violates the various conditions associated with the parole, he or she may be required to serve the remainder of the original sentence; that period could be more than nine months. Ohio Adm.Code 5120:1-1-19(C).

Even after a prisoner has met the minimum eligibility requirements, parole is not guaranteed; the Adult Parole Authority "has wide-ranging discretion in parole matters" and may refuse to grant release to an eligible offender. \* \* \* Because parole is not certain to occur, trial courts are not required to explain it as part of the maximum possible penalty in a Crim.R. 11 colloquy. \* \* \*

{¶ 27} Similarly to this case, one of the issues in *Clark* was whether the defendant's guilty plea had been knowing, voluntary, and intelligent, as required by Crim.R. 11(C). At

issue was the fact the trial court had advised appellant in the Crim.R. 11(C) colloquy that he would be subject to mandatory postrelease control, as set forth at R.C. 2967.28, which was also made part of the judgment entry, not that he would be subject to parole. On appeal, the Eleventh District Court of Appeals determined that the trial court had substantially complied with the requirements of Crim.R. 11(C), since the trial court had correctly advised appellant that the maximum penalty for aggravated murder was life imprisonment without parole.

{¶ 28} The Supreme Court of Ohio reversed the appellate court, holding that the trial court's Crim.R. 11 colloquy failed to meet the substantial compliance standard. The court held, in pertinent part:

The trial judge was not required to discuss postrelease control or parole in Clark's plea colloquy under Crim.R. 11(C)(2), as Clark was not eligible for postrelease control given his plea to an unclassified felony. See R.C. 2967.28(B) and (C). When he expanded on the information set forth in the rule, the trial judge obscured the relatively straightforward maximum penalties for Clark's crimes. The judge described a decidedly different form of release than the one Clark actually faced under the law, a hybrid system that combined the mandatory term of years and the maximum possible sentences associated with postrelease control with the uncertainty of release associated with parole.

Such an incorrect recitation of the law fails to meet the substantial compliance standard. If a trial judge chooses to offer an expanded explanation of the law in a Crim.R. 11 plea colloquy, the information

conveyed must be accurate. The rule is in place to ensure that defendants wishing to plead guilty or no contest do so knowingly, intelligently, and voluntarily. Because of the substantial misinformation that the trial judge provided to the defendant in this case, the defendant could not have entered his plea knowingly, intelligently, and voluntarily. The fact that the trial court provided some correct information as well does not alter this conclusion, because the correction (sic) information was not provided in such a manner as to remedy the erroneous information.

Despite the failure to substantially comply with Crim.R. 11, the trial judge did not simply ignore his duties under Crim.R. 11(C)(2)(a). Because the trial judge partially complied with the rule, Clark must show that he was prejudiced by the trial court's misinformation to successfully vacate his plea. \* \* \* Although it discussed prejudice in its opinion, the court of appeals did not reach a conclusion on the issue. We therefore remand the case for a full determination of prejudice. *Clark*, 2008-Ohio-3748, at ¶ 38-40.

{¶ 29} On remand, the Eleventh District Court of Appeals held that the defendant had suffered no prejudice as a result of the trial court's failure to explain parole properly. *State v. Clark*, 11th Dist. Ashtabula No. 2006-A-0004, 2008-Ohio-6768. The Eleventh District explained that the defendant "has presented no evidence and points to no evidence in the record suggesting that his plea would have been otherwise had he known the actual conditions of parole." *Id.* at ¶ 16. The court concluded that "[w]ithout some evidence that [the defendant] was motivated by the expectation of being subject to post-release control upon release, we must affirm the plea." *Id.* at ¶ 22. See also *State v. Stokes*, 8th Dist.

Cuyahoga No. 93154, 2010-Ohio-3181; *State v. Eberle*, 12th Dist. Clermont No. CA2009-10-065, 2010-Ohio-3563.

{¶ 30} There is nothing in the record to suggest Eggers would not have entered his guilty plea had the trial court not erroneously informed him that he was subject to a mandatory five-year term of postrelease control. Therefore, Eggers has failed to demonstrate prejudice resulting from the trial court's error in discussing and sentencing Eggers to a five-year term of postrelease control. We will, however, vacate that portion of the sentence imposing a five-year term of postrelease control.

{¶ 31} Eggers's Second Assignment of Error is overruled.

#### IV. Conclusion

{¶ 32} The portion of Eggers's sentence imposing a five-year term of postrelease control is Vacated. Both of Eggers's assignments of error having been overruled, the judgment of the trial court is Affirmed in all other respects.

.....  
WELBAUM, J., concurs.  
DONOVAN, J., concurs in judgment only.

Copies mailed to:

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Hon. Douglas M. Rastatter

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JUL 26 2013 Certified as  
Opinion Filed 7/23, 2013  
Clerk  
By *Andrew Hrusky* Deputy  
Common Pleas Court, Clark County Ohio

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

ADAM EGGERS

Defendant-Appellant

Appellate Case No. 2011-CA-48

Trial Court Case No. 2011-CR-40

(Criminal Appeal from  
Common Pleas Court)

**FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 19th day  
of July, 2013, that part of the judgment of the trial court imposing post-  
release control as part of the sentence is **Vacated**, and the judgment of the trial court is  
**Affirmed** in all other respects.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Clark County  
Court of Appeals shall immediately serve notice of this judgment upon all parties and make  
a note in the docket of the mailing.

CLARK COUNTY  
COURT OF APPEALS

JUL 23 2013

FILED  
RONALD E. VINCENT, CLERK

  
MIKE FAIN, Presiding Judge

  
MARY E. DONOVAN, Judge

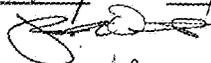
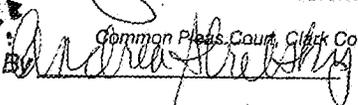
  
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